Kanowit Timber Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri

HIGH COURT (KUCHING) — SUIT NO 14–03 OF 2008
DAVID WONG J
30 JULY 2008

Revenue Law — Income tax — Assessment — Special Commissioners — Whether finding of primary facts reviewable — Whether Special Commissioner erred to limit s 22(2)(a)(i) to recoup or recover sums of an income or revenue nature

Statutory Interpretation — Construction of statutes — Purposive approach — 'Outgoings and expenses deductible in ascertaining adjusted income' — Whether interpretation of tax statute different from other statutes — Income Tax Act 1967 ss 22(2)(a)(i) & 33

The appellant was a logging contractor who carried on the business of felling and extracting timber. The appellant had, vide a supplementary agreement dated 30 June 1999, appointed Alpha Prosper as its sub-contractor to fell and extract merchantable timber in the licensed area. In respect of the logging roads and camp facilities, Alpha Prosper paid the appellant a sum of RM2,120,000 which was fixed or arrived at by reference to rentals or toll charges which might be collected for the use of the logging roads and camp facilities by Alpha Prosper based on the expected tonnage which might be carried over the roads and capping the amount at ten years. The said amount also represented a recovery or recoupment of the expenditures and outgoings incurred by the appellant for repairs and maintenance of the logging roads and camp facilities for years 1991–1999 amounting to RM11,465,267 which were allowed to be deducted under s 33 of the Income Tax Act 1967. The appellant herein was appealing against the decision of the Special Commissioners of Income Tax that had dismissed the appellant's appeal against the assessment of the sum of RM145,386.92 for the year 2000. The notice of assessment had excluded the sum of RM2,120,000 which was reported by the appellant as 'sundary income' in its audited accounts for the year 1999, thereby producing a tax liability of RM145,386.92. The issues raised before the Special Commissioners were also raised before this court namel: (i) whether the sum of RM2,120,000 received under from Alpha Prosper was a capital receipt or revenue receipt; and (ii) whether the receipt of RM2,120,000 was within s 22(2)(i) of the Income Tax Act 1967. The

Special Commissioners held that the receipt of the sum of RM2,120,000 was capital in nature but went on to hold that the capital receipt did not fall into the category of income under s 22 of the Act. With regards to the sum of RM2,120,000, whether it is of capital or income nature, the Special Commissioners came to the conclusion that it was capital in nature. Their reasons were that the appellant's business was that of a logging contractor and not one of selling camp facilities and trunk road.

Held, allowing the appellant's appeal with costs:

(1) The operative words of s 22(1) and (2) of the Act are 'outgoings and expenses deductible in ascertaining the adjusted income'. To determine what those words mean one must refer to s 33 of the Act which defines what 'outgoings and expenses' are deductible in ascertaining the 'adjusted income'. By virtue of s 33, only expenses which are 'wholly and exclusively incurred during that period by that person in the production of gross income from that source' were deductible. The Special Commissioners were correct to limit s 22(2)(a)(i) of the Act to recovered sum of income nature. Section 22 read together with s 33 of the Act provides an obvious answer (see paras 14 & 16).

(2) The Special Commissioners had found that the sum of RM2,120,000 'was fixed or arrived at by reference to rentals or toll charges which might be collected for the use of the logging roads and camp facilities by Alpha Prosper based on expected tonnage which might be carried over the roads and capping the amount at ten years'. By this finding, the Special Commissioners had in fact found as a primary fact that the original source of the sum of RM2,120,000 stems from a revenue nature as it was expense deductible under s 33 of the Act. That being the case, the only conclusion that the Special Commissioners acting judicially and properly instructed in the law could have come to, is to hold that the sum falls to be treated as gross income of the taxpayer under s 22(2)(a)(i). Furthermore when an amount is received to fill in what 'might be collected for the use of the logging roads and camp facilities', it is treated as revenue income (see para 18).

(3) The Special Commissioners had erred when they failed to consider or ignore the consequence of their own findings. Nor was there any attempt to reconcile their findings with their conclusion. The sum of RM2,120,000 was to be taxable under s 22(2)(a)(i) of the Act (see para 19).

[Bahasa Malaysia summary

Perayu adalah kontraktor pembalakan yang menjalankan perniagaan

penebangan dan pengektrakan balak. Perayu telah, melalui perjanjian tambahan yang bertarikh 30 Jun 1999, telah melantik Alpha Prosper sebagai subkontraktornya untuk menebang dan mengekstrak balak yang boleh didagangkan di dalam kawasan yang berlesen. Berkenaan dengan jalan pembalakan dan kemudahan kem, Alpha Prosper membayar kepada perayu sejumlah RM2,120,000 yang mana telah ditetapkan atau yang dicapai yang merujuk kepada sewaan atau bayaran tol yang berkemungkinan dikutip bagi penggunaan jalan pembalakan dan kemudahan kem oleh Alpha Prosper berdasarkan kepada jangkaan muatan yang berkemungkinan dibawa menggunakan jalan dan meliputi jumlah sepuluh tahun. Jumlah tersebut juga mewakili pendapatan semula atau mendapatkan balik perbelanjaan dan wang keluar yang ditanggung oleh perayu untuk memperbaiki dan menyelenggara jalan pembalakan dan kemudahan kem untuk tahun 1991–1999 yang berjumlah RM11,465,267 yang dibenarkan untuk ditolak di bawah s 33 Akta Cukai Pendapatan 1967. Perayu merayu terhadap keputusan Suruhanjaya Khas Cukai Pendapatan yang telah menolak rayuan perayu terhadap taksiran sejumlah RM145,386.92 bagi tahun 2000. Notis taksiran tidak memasukkan sejumlah RM2,120,000 yang mana telah dilaporkan oleh perayu sebagai 'pendapatan pelbagai' di dalam akaunnya yang telah diaudit bagi tahun 1999, dengan itu menjadikan liability cukai sebanyak RM145,386.92. Isu yang telah dibangkitkan di hadapan Suruhanjaya Khas juga dibangkitkan di mahkamah ini iaitu: (i) sama ada sejumlah RM2,120,000 yang diterima di bawah daripada Alpha Prosper adalah satu penerimaan modal atau penerimaan hasil; dan (ii) sama ada penerimaan RM2,120,000 adalah di dalam s 22(2)(i) Akta Cukai Pendapatan 1967. Suruhanjaya Khas telah memutuskan bahawa penerimaan sejumlah RM2,120,000 adalah bersifat modal tetapi telah berpegang bahawa penerimaan modan tidak termasuk di dalam kategori pendapatan di bawah s 22 Akta tersebut. Berkenaan dengan sejumlah RM2,120,000, sama ada ianya adalah bersifat modal atau pendapatan, Suruhanjaya Khas menyimpulkan bahawa ianya adalah bersifat modal. Alasan mereka adalah bahawa perniagaan perayu adalah kontraktor pembalakan dan bukannya yang menjual kemudahan kem dan jalan utama.

Diputuskan, membenarkan rayuan perayu dengan kos:

(1) Perkataan yang tepat bagi s 22(1) dan (2) Akta tersebut adalah 'wang keluar dan perbelanjaan yang boleh dipotong dalam memastikan penyelarasan pendapatan'. Untuk menentukan apa yang dimaksudkan oleh perkataan-perkataan tersebut, mestilah merujuk kepada s 33 Akta tersebut yang mentakrifkan apa dia 'wang keluar dan perbelanjaan yang boleh dipotong dalam memastikan penyelarasan pendapatan'. Berdasarkan kepada s 33, hanya perbelanjaan yang mana 'kesemua dan secara eksklusifnya ditanggung semasa tempoh tersebut oleh orang

tersebut dalam penghasilan pendapatan kasar daripada sumber tersebut' adalah boleh dipotong. Suruhanjaya Khas adalah benar yang menghadkan s 22(2)(a)(i) Akta tersebut untuk mendapatkan semula jumlah yang bersifat pendapatan. Seksyen 22 yang dibaca bersama dengan s 33 Akta tersebut memperuntukkan jawapan yang jelas (lihat perenggan 14 & 16).

(2) Suruhanjaya Khas mendapati bahawa sejumlah RM2,120,000 'telah ditetapkan atau dicapai yang merujuk kepada sewaan atau bayaran tol yang berkemungkinan dikutip bagi penggunaan jalan pembalakan dan kemudahan kem oleh Alpha Prosper berdasarkan kepada jangkaan muatan yang berkemungkinan dibawa melalui jalan dan meliputi jumlah untuk sepuluh tahun'. Berdasarkan keputusan ini, Suruhanjaya Khas sebenarnya mendapati fakta utama bahawa sumber sebenar sejumlah RM2,120,000 berpunca daripada satu yang bersifat hasil yang mana ianya perbelanjaan yang boleh dipotong di bawah s 33 Akta tersebut. Oleh yang demikian, satu-satunya kesimpulan adalah Suruhanjaya Khas telah bertindak dengan adil dan sebaik-baiknya seperti yang diarahkan oleh undang-undang, yang berpegang bahawa jumlah tersebut hendaklah dianggap sebagai pendapatan kasar pembayar cukai di bawah s 22(2)(a)(i). Selanjutnya, apabila jumlah tersebut diterima untuk mengisi apa yang 'berkemungkinan dikutip untuk penggunaan jalan pembalakan dan kemudahan kem', ianya dianggap sebagai hasil pendapatan (lihat perenggan 18).

(3) Suruhanjaya Khas telah terkhilaf apabila mereka gagal untuk mempertimbangkan atau mengabaikan akibat keputusan mereka. Begitu juga, terdapat mana-mana cubaan untuk menyelaraskan keputusan dengan kesimpulan mereka. Sejumlah RM2,120,000 adalah boleh dicukai di bawah s 22(2)(a)(i) Akta tersebut (lihat perenggan 19).]

Notes

For cases on assessment of income tax, see 10 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 2192–2219.

For cases on purposive approach, see 11 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1952–2009.

Cases referred to

Aspac Lubricants (M) Sdn Bhd (formerly known as Castrol (M) Sdn Bhd) v Ketua Pengarah Hasil Dalam Negeri [2007] 6 MLJ 65 (refd)

California Copper Syndicate (Ltd) v Harris (1904) 5 TC 159 (refd)

Canada Sugar Refining Co Ltd v R (1898) AC 735 (refd)

Carapark Holdings Ltd v Federal Commissioner of Taxation (1967) 115 CLR 653 (refd)

Keir & Cawder Ltd v Commissioners of Inland Revenue (1958) 38 TC 23 (refd)

Ketua Pengarah Hasil Dalam Negeri v Hock Lee Holdings Sdn Bhd [2008] 2 MLJ 547 (refd)
Madanlal Fakirchand Dudhediya v Shree Changdeo Sugar Mills Ltd & Ors AIR 1962 SC 1543 (refd)
Murphy v Thomas E Gray & Co [1940] 2 KB 175 Nevill & Co v FC of T (1973) 4 at D 187 (refd)
Palm Oil Research and Development Board Malaysia & Anor v Premium Vegetable Oils Sdn Bhd and another appeal [2005] 3 MLJ 97 (refd)

Legislation referred to

Income Tax Act 1967 ss 6B, 22, 22(1), 22(2), 22(2)(a)(i), 33

Chew Peng Hui (Battenberg & Talma) for the appellant.
Noor Kamaliah Mohd Japeri (Mohamad Harris Hanapi & Wan Khairuddin Wan Montil with her) (Malaysian Inland Revenue Board) for the respondent.

David Wong J:

APPEAL

[1] This is an appeal by way of case stated against the decision of the Special Commissioners of Income Tax (special Commissioner) handed down on the 6 August 2007 dismissing the appellant's appeal against the assessment of the sum of RM145,386.92 for the year 2000 made by the respondent.

APPROACH OF THE COURT IN THIS APPEAL

[2] I had in the recent case of *Ketua Pengarah Hasil Dalam Negeri v Hock Lee Holdings Sdn Bhd* [2008] 2 MLJ 547 examined the relevant cases on this aspect of the law and extracted the following principles:

> Firstly, whoever appeals against the decision of the Special Commissioners bears the burden of proof to show that the same is wrong.
>
> Secondly, to discharge that burden the appellant must show that the decision of the Special Commissioners was a decision 'which no person properly instructed in the relevant law and acting judicially could have come to'. (see *Edward v Bairstow*)
>
> Thirdly, the party challenging the Special Commissioners' findings of fact must ask for the case stated to state a question whether a particular finding of fact is unjustified in view of the evidence adduced.
>
> Fourthly, findings of primary facts by the Special Commissioners cannot be questioned by the court as it does not sit as a review court of facts. The court's power is to determine whether the conclusion reached by the Special Commissioners is consistent to the primary facts.

[3] In *Aspac Lubricants (M) Sdn Bhd (formerly known as Castrol (M) Sdn Bhd) v Ketua Pengarah Hasil Dalam Negeri* [2007] 6 MLJ 65 at p 70, the Court of Appeal also applied the same principles:

> Before I embark upon a discussion of the issue at hand, let me re-state what the leading authorities have said is the role of a court in a tax appeal by way of case stated. I will simply call it a tax appeal. Such a proceeding is not an appeal in the ordinary sense known to the law. In an ordinary appeal, an appellate court is entitled to interfere with findings of fact if there has been insufficient or no judicial appreciation of the evidence. In a tax appeal we the courts are bound by the findings of fact made by the Commissioners. And the drawing of inferences by the commissioners is beyond review by a court 'unless it is such as no reasonable body of Commissioners, correctly directing themselves in law, could properly have drawn … (*Mamor Sendirian Berhad v Director General of Inland Revenue* [1986] 1 MLJ 1, per Lord Keith of Kinkel). But we have the final say on questions of law.

PRIMARY FACTS FOUND BY THE SPECIAL COMMISSIONERS

[4] As these facts are not reviewable, it is appropriate that I reproduce them in full:

(i) The appellant, a company incorporated under the Companies Act 1965, is at all material times a logging contractor which carried on the business of felling and extracting timber.

(ii) Balleh Sawmill Company Berhad (Co No 106710-M) is the holder of timber license No T/0378 ('licensee'). The appellant is the logging contractor for the licensee for the areas covered by the said license.

(iii) The appellant's accounting years at all material times started on 1 May and ended June 30.

(iv) Between 1990 to 1999, the appellant claimed a total of RM11,465,267 in respect of repairs and maintenance which were allowed as deductions under s 33 of the Income Tax Act 1967 by the respondent.

(v) By a supplementary agreement dated 30 June 1999, the appellant had appointed Alpha Prosper Sdn Bhd (No 483131–D) ('Alpha Prosper') as its sub-contractor to fell and extract merchantable timber in the said licence area. Under the agreement the appellant shall pay Alpha Prosper for each hoppus ton of merchantable timber logs felled and delivered to the designated loading point of the licensee within the timber licence area a contract price as specified in the first schedule of the agreement. The appellant also agrees to sell to Alpha Prosper the logging equipments on 'as is where is' basis and free from all encumbrances. Alpha Prosper also paid in respect of the logging roads and camp facilities the amount of RM2,120,000 which was fixed or arrived at by reference to rentals or toll charges which might be collected for the use

of the logging roads and camp facilities by Alpha Prosper based on expected tonnage which might be carried over the roads and capping the amount at ten years. The amount also represented a recovery or recoupment of the expenditures and outgoings incurred by the appellant for repairs and maintenance of the logging roads and camp facilities for years 1991 – 1999 amounting to RM11,465,267 which were allowed to be deducted under s 33 of the Income Tax Act 1967. The amount paid to Alpha Proper was made up as follows:

Sg Lupus Camp Facilities @ RM50,000	RM50,000
Main Trucking Road 15 miles @ RM50,000 per mile	RM750,000
Nanga Dap Camp Facilities @ RM70,000	RM70,000
Main Trucking Road 25 miles @ RM50,000 per mile	RM1,250,000
	RM2,120,000

(vi) The appellant has reported the RM2,120,000 as 'sundry income' in its audited accounts for the year 1999.

(vii) At the expiry of Alpha Prosper's logging contract with the appellant as well as appellant's logging contract with the licensee, the logging roads and camp facilities remained with the land and that Alpha Prosper did and could not ask for any refund in respect of the RM2,120,000 or any portion of it.

(viii) The logging road and camp facilities were not treated as assets in the accounts of the appellant. The amount of RM2,120,000 was reported by the appellant as 'sundry income' in its audited accounts for the year 1999.

(ix) Notice of Assessment for the Year of Assessment 2000 was issued to the appellant on 17 March 2002. It excluded the sum of RM2,120,000 as gross income thereby producing a tax liability of RM145,386.92 which is the subject of this appeal.

(x) The appellant's Form Q filed by the appellant was forwarded to the Special Commissioners of Income Tax on 25 January 2005.

[5] For the purpose of this appeal, counsels for both the appellant and the respondent had also submitted to the court a set of agreed facts which included the fact that the respondent during a desk audit dated 2 November 2004 added back the sum of RM11,465,267.00 for the Year of Assessment 1992–1999 and notices of additional assessment were issued on 2 November 2004. The appellant had appealed against that assessment and it is still pending.

[6] During the hearing of this appeal, I asked counsels whether this fact should be taken into consideration in my deliberation. Neither counsel gave me any definite reply. Be that as it may, it is my view that I must ignore the respondent's decision to add back the sum of RM11,465,267 for the reason that this is an appeal by way of a case stated and my decision must be based on the same evidence as before the Special Commissioners. That being the case, the primary fact that the sum of RM2,120,000 represented 'a recovery or recoupment of the expenditures and outgoings incurred by the appellant for repairs and maintenance of the logging roads and camp facilities for years 1991–1999 amounting to RM11,465,267 which were allowed to be deducted under s 33 of the Income Tax Act 1967 remains intact. In any event there was no challenge by the respondent in this appeal on that finding.

ISSUES

[7] The issues before the Special Commissioners and here are the same and they are:

(1) Whether the sum of RM2,120,000 received under a aupplementary agreement dated 30 June, 1999 from Alpha Prosper Sdn Bhd is a capital receipt or revenue receipt?

(2) Is the receipt of RM2,120,000 within s 22(2)(a)(i) of the Income Tax Act 1967?

ISSUE 2

[8] I shall firstly deal with Issue 2 which concerns the interpretation of s 22 of the Income Tax Act 1967 ('Act') which reads as follows:

> Chapter 3 — Gross income
>
> 22 Gross income generally.
>
> (1) Subject to this Act, the gross income of a person from a source of his for the basis period for a year of assessment shall be the gross income from that source for that period ascertained in accordance with the following provisions of this Chapter (that person and that period being referred to in those provisions as the relevant person and the relevant period respectively).
>
> (2) Subject to this Act, the gross income of a person from a source of his for the basis period for a year of assessment shall include any sums receivable or deemed to have been received for that basis period in relation to that source by way of —

(a) insurance, indemnity, recoupment, recovery, reimbursement or otherwise —

(i) where such sums are in respect of the kind of outgoings and expenses deductible in ascertaining the adjusted income of that person from that source; or

(ii) under a contract of indemnity;

(b) compensation for loss of income from that source; and

(c) a rebate under s 6B.

[9] In respect of this issue the Special Commissioners firstly held that the receipt of the sum of RM2,120,000 was capital in nature and then went on to hold that the capital receipt 'did not fall into the category of income' under s 22 of the Act. In other words for s 22 of the Act to apply, the sum of RM2,120,000 must be of an income nature.

[10] Counsel for the appellant submitted that the Special Commissioners had committed eight serious errors of law in their views on this issue which are:

(1) The Special Commissioners having found as a fact that the RM2,120,000 'represented a recovery or recoupment of the expenditures and outgoings incurred by the appellant for repairs and maintenance of the logging roads and camp facilities for years 1991–1999 amounting to RM11,465,267 which were allowed to be deducted under s 33 of the Act the only conclusion that the Special Commissioners acting judicially and properly instructed in the law could have come to is to hold that the sum falls to be treated as gross income of the taxpayer under s 22(2)(a)(i) of the Act.

(2) The Special Commissioners were wrong to hold that s 22(2)(a)(i) of the Act only applies to recovered sums of an income nature.

(3) The Special Commissioners erred in not applying a purposive interpretation of s 22(2)(a)(i) of the Act which is the embodiment of a part of the 'tax benefit rule' which in the American Jurisdiction is described as follows:

> Under the tax benefit rule, when an amount deducted in prior year is recovered in a later year, or an event occurs in a later year that is inconsistent with the premise on which the deduction was based, the taxpayer must include the amount in its income for the later year to the extent the prior deduction resulted in a tax benefit (*Hillsboro National Bank v Commissioner*, 460 US 370, pp 383–384 (1983)).

(4) There is no basis or justification for construing s 22(2)(a)(i) as being confined to sums which 'fall within the category of income' in the section ie being confined to income receipts. The tax benefit rule is necessary exactly because in many instances the sum recovered, recouped or reimbursed would otherwise be considered capital under general principles of tax law.

(5) The Special Commissioners' conclusion that the sum is a capital receipt because it is the price for the realization or sale of the roads which are not taxpayer's trading stock but their asset is flawed as it wrongly applied the test in Californian Copper Syndicate. Furthermore their conclusion is against the evidence and their own findings of fact.

(6) The Special Commissioners' interpretation of the section renders the section superfluous and otiose because if a payment qualifies as a 'category of income' on general principles then there is no need for the section at all.

(7) The Special Commissioners' interpretation in effect allows taxpayers to easily avoid the provision by dressing up payments as proceeds of sale of 'assets' even if such assets do not in law belong to them and renders the provision completely docile.

(8) The Special Commissioners also did not cite any authority nor any reasons for their view that s 22(2)(a)(i) of the Act applies only to sums recovered to be of an income nature.

[11] I shall deal with errors (2), (3), (4), (6), (7) and (8) together as they all concern the interpretation of s 22(2)(a)(i) of the Act. The approach to the interpretation of tax statutes is now no longer different from the interpretation of other statutes. This was made clear in the case of *Palm Oil Research and Development Board Malaysia and Anor v Premium Vegetable Oils Sdn Bhd & another appeal* [2005] 3 MLJ 97 where Steve Shim (the then Chief Judge of Sabah and Sarawak) said:

> Now, the Court of Appeal, in the present case, had expressly held that the provisions of a taxing statute should be construed strictly without regard to the purpose, object or intent of the statute, relying, quite obviously, on the Supreme Court case of *National Land-Finance Co-operative v Director-General of Inland Revenue* [1994] 1 MLJ 99 when Gunn Chit Tuan CJ (Malaya) said:
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> > There are ample authorities to show that the courts have refused to adopt a construction of a taxing statute which would impose liability when doubt exists. In *Re Micklewait*, it was held that a subject was not to be taxed without clear words. We realise that revenue from taxation is essential to enable the government to administer the country and that courts should help in the collection of taxes whilst remaining fair to tax payers. Nevertheless, we should

> remind ourselves of the principle of strict interpretation as stated by Rowlatt J in *Cape Brandy Syndicate v Inland Revenue Commissioners*... It has been said by the Judicial Committee in *Oriental Bank Corp v Wright* that the intention to impose a charge upon a subject must be shown by clear and unambiguous language ...

With respect, the principle of strict interpretation of statutes enunciated by Rowlatt, J could not be regarded as the locus classicus on the issue. Indeed as long ago as 1899, Lord Russell of Killowen CJ took a different approach in *AG v Carlton Bank* (1899) 2 QB 158, when he said inter alia:

> I see no reason why special canons of construction should be applied to any Act of Parliament and I know of no authority for saying that a taxing Act is to be construed differently from any other Act. The duty of a court is, in my opinion, in all cases the same; whether the Act to be construed relates to taxation or any other subject, viz to give effect to the intention of the legislature ...

In *Luke v IRC* [1963] AC 557, Lord Reid in the House of Lords, echoed similar views. And much later, Lord Wilberforce expanded the principle in *WT Ramsay Ltd v Inland Revenue Commission* [1982] AC 300 when he said as follows:

> A subject is only to be taxed on clear words, not on 'intendment' or on the 'equity' of an Act... What are 'clear words' is to be ascertained on normal principles; these do not confine the courts to literal interpretation. They may, indeed should, be considered in the context and scheme of the relevant Act as a whole, and its purpose may, indeed should, be regarded ...

This is known as the *Ramsay* principle. While clear words are needed before a tax can be imposed, what those words are would be interpreted in line with the purposive approach. Undoubtedly, in the United Kingdom, there is currently a more pronounced shift from the strict literal interpretation of a taxing statute. The *Ramsay* principle of statutory interpretation seems to have entrenched itself; (see *Pepper v Hart* [1993] AC 593). In Malaysia, that principle should apply and it must be applied in consonance with s 17A of the Interpretation Acts 1948/1967 which stipulates:

> In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object

It is pertinent to note that s 17A was a recent amendment under the Interpretation (Amendment) Act 1997 (Act A996) and became effective on 25 July 1997. This would be after the National Land Finance Co-operative. In my view, the law is now clear beyond doubt. Section 17A above enjoins the purposive approach to statutory interpretation. *This applies to all statutes including taxing statues.* (Emphasis added.)

[12] I will now look at the s 22(2)(a)(i) of the Act by adopting the purposive approach to the interpretation of statute as laid down by the

Federal Court. I must also keep in mind that in any statutory construction a statute should be read as a whole and each clause in a statute is to be 'construed with reference to the context and other clauses of the Act, so as, as far as possible, to make a consistent enactment of the whole statute' as per Lord Davey in *Canada Sugar Refining Co Ltd v R* (1898) AC 735 at p 741. (See also: *Madanlal Fakirchand Dudhediya v Shree Changdeo Sugar Mills Ltd & Ors* AIR 1962 SC 1543).

[13] I have no doubt that s 22(2)(a)(i) of the Act is an embodiment of the 'tax benefit rule' as submitted by counsel for the appellant. Be that as it may, that does not resolve the issue of whether the Special Commissioners had erred to limit s 22(2)(a)(i) of the Act to recouped or recovered sums of an income or revenue nature.

[14] Section 22(1) and (2) of the Act provide, in general, that gross income of a person from a source include sums receivable by way of insurance, indemnity, recoupment, recovery and reimbursement where such sums are in respect of outgoings and expenses deductible in ascertaining the adjusted income. The operative words are 'outgoings and expenses deductible in ascertaining the adjusted income'. To determine what those words mean one must refer to s 33 of the Act which defines what 'outgoings and expenses' are deductible in ascertaining the 'adjusted income'. It provides as follows:

> 33 Adjusted income generally.
>
> (1) Subject to this Act, the adjusted income of a person from a source for the basis period for a year of assessment shall be an amount ascertained by deducting from the gross income of that person from that source for that period all outgoings and expenses wholly and exclusively incurred during that period by that person in the production of gross income from that source, including
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> (a) subject to subsection (2), any sum payable for that period (or for any part of that period) by way of interest upon any money borrowed by that person and
>
> (i) employed in that period in the production of gross income from that source; or
>
> (ii) laid out on assets used or held in that period for the production of gross income from that source;
>
> (b) rent payable for that period (or for any part of that period) by that person in respect of any land or building or part thereof occupied by him in that period for the purpose of producing gross income from that source;

(c) expenses incurred during that period for the repair of premises, plant, machinery or fixtures employed in the production of gross income from that source or for the renewal, repair or alteration of any implement, utensil or article so employed, other than implements, utensils, articles (the expenditure on which would be qualifying plant expenditure for the purposes of Schedule 3) or any means of conveyance, excluding the cost of reconstructing or rebuilding —

(i) any premises, buildings, structures or works of a permanent nature;

(ii) any plant or machinery; or

(iii) any fixtures; and

(d) such other deductions as may be prescribed.

[15] So reading s 33 of the Act, only expenses which are 'wholly and exclusively incurred during that period by that person in the production of gross income from that source' are deductible. Latham CJ provides an explanation of what the words 'in the production of income' mean in *Nevill & Co v FC of T* (1973) 4 ATD 187 as follows:

> In my opinion the answer to this contention is to be found in a recognition of the fact that it is necessary, for income tax purposes, to look at the business as a whole set of operations directed towards producing income. No expenditure, strictly and narrowly considered, in itself actually gains or produces income. It is an outgoing, not an incoming. Its character can be determined only in relation to the object which a person making the expenditure has in view. If the actual object is the conduct of the business on a profitable basis with that due regard to economy which is essential in any well conducted business, then the expenditure … is an expenditure incurred in gaining or producing the assessable income. If it is not a capital expenditure it should be deducted in ascertaining the taxable income of the taxpayer'.

[16] Based on dicta of Latham CJ, deductible expenses can only refer to income or revenue expenses. That being the case, the only conclusion for me is that the Special Commissioners were correct to limit the s 22(2)(a)(i) of the Act to recovered sum of income nature. This may very well explain why the Special Commissioners did not offer any rationale or reasons for their views on this issue as s 22read together with s 33 of the Act provides an obvious answer. (See also 2001 *Malaysian Tax Handbook and Malaysian Taxation – Principles and Practice* (2008 Ed) where both authors said that 'sums

receivable under s 22(2)(a)(i) of the Act must be sums recoverable in respect of circulating assets in general, that is, recoveries in respect of revenue expenditure).

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[17] With that I now deal with errors (1) and (5) which in essence concerns issue 1 and that is whether the sum of RM2,120,000 is of capital or income nature. The Special Commissioners, on this issue, applied the test in *California Copper Syndicate (Ltd) v Harris* (1904) 5 TC 159 which requires the consideration of 'the nature of the company, the character of the asset realised, the nature of the business carried on by the taxpayer, the circumstances of the particular realisation and whether the taxpayer carries on another business' and came to the conclusion the sum of RM2,120,000 was capital receipts. Their reasons are that the appellant's business was that of a logging contractor and not of one selling camp facilities and trunk road. They also relied on cl 1 of the supplementary agreement dated 30 June 1999 which provides as follows:

> The contractor agrees to sell and the subcontractor agrees to purchase the said infrastructures as described in the Schedule annexed here to free from all encumbrances, claims, liens or interest for agreed purchase price of RM2,120,000.

[18] What troubles this court is that this conclusion is at odds with finding 6(v) of encl 2 which was set out earlier and in brief found that the sum of RM2,120,000 represented a recovery or recoupment of the expenditures and outgoings incurred by the appellant for repairs and maintenance of the logging roads and camp facilities for years 1991–1999 amounting to RM11,465,267 which were allowed to be deducted under s 33 of the Income Tax Act 1967. In making that finding, the Special Commissioners had found that the sum of RM2,120,000 'was fixed or arrived at by reference to rentals or toll charges which might be collected for the use of the logging roads and camp facilities by Alpha Prosper based on expected tonnage which might be carried over the roads and capping the amount at ten years'. By this finding, the Special Commissioners had in fact found as a primary fact that the original source of the sum of RM2,120,000 stems from a revenue nature as it was expense deductible under s 33 of the Act. That being the case I have no option but to agree with counsel for the appellant that 'the only conclusion that the Special Commissioners acting judicially and properly instructed in the law could have come to is to hold that the sum falls to be treated as gross income of the taxpayer under s 22(2)(a)(i)'. The law is also clear as to my power and that is I cannot divert from the primary facts of the Special Commissioners. I can only consider whether their findings are consistent with their conclusion. Furthermore when an amount is received to

fill in what 'might be collected for the use of the logging roads and camp facilities', it is treated as revenue income. In *Carapark Holdings Ltd v Federal Commissioner of Taxation* (1967) 115 CLR 653 the High Court of Australia in dealing with receipt of insurance money on the death of an employee found such receipts to be of a revenue nature and in doing so said this:

> 10 There seem to be only two possibilities worth considering. One is that when the insurance was being negotiated the motivating consideration on the part of the appellant was that in any of the events insured against the receipt of the policy moneys would place the appellant in a position to do exactly the kind of thing it did in this instance, namely to extend an appropriate degree of generous treatment to the employee or his dependants. If any such notion existed, it was left to be further considered when the time should arrive. The only other possibility seems to be that as regards employees of subsidiaries the insurance was effected in order that in any of the events insured against the appellant should receive money to take the place of that which it would otherwise have derived from a continuance of the services of the employee to the subsidiary. (At p 663).
>
> 11 In our opinion, if either of these two possibilities explains the insurance, the conclusion follows that the insurance moneys reached the hands of the appellant as income, for reasons analogous to those which Lord Greene MR elaborated and the House of Lords approved in *Williams's Executors v Inland Revenue Commissioners* (1944) 26 Tax Cas 23 in relation to an insurance taken out by a company on the lives of its own employees. The reasons may be summarized by saying that, in general, insurance moneys are to be considered as received on revenue account where the purpose of the insurance was to fill the place of a revenue receipt which the event insured against has prevented from arising, or of any outgoing which has been incurred on revenue account in consequence of the event insured against, whether as a legal liability or as a gratuitous payment actuated only by considerations of morality or expediency. See also *Murphy v Thomas E Gray & Co* [1940] 2 KB 175; *Keir & Cawder Ltd v Commissioners of Inland Revenue* (1958) 38 Tax Cas 23. (Emphasis added.)

[19] With respect where the Special Commissioners had erred was that they failed to consider or ignored the consequence of their own findings. Nor was there any attempt to reconcile their findings with their conclusion.

[20] Accordingly and for reasons stated above, I find that the sum of RM2,120,000 to be taxable under s 22(2)(a)(i) of the Act and allow the appeal of the appellant with costs to be taxed unless agreed.

Appeal allowed with costs.

Reported by Ashgar Ali Ali Mohamed